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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/893,314	06/27/2001	Phillip B. Blankenship	M7285.021	2106

23875 7590 10/17/2007

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EXAMINER	
FLETCHER III, WILLIAM P	
ART UNIT	**PAPER NUMBER**
1792	
MAIL DATE	**DELIVERY MODE**
10/17/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	09/893,314	BLANKENSHIP ET AL.	
	Examiner	Art Unit	
	William P. Fletcher III	1792	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *26 July 2007*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *37-59* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *37-59* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Response to Arguments

1. Applicant's arguments filed July 26, 2007, have been fully considered but they are not persuasive.

A. Applicant argues:

> The present invention employs the standard definition for aggregate as that term is understood in the road building industry which means hard mineral aggregate, i.e., gravel and crushed stone. ...Thus Helf teaches away from the use of traditional aggregate in his invention, but instead teaches use of a flexible material which he has called flexible aggregate since it is being substituted in his invention for true, hard, traditional mineral aggregate.

This argument is not persuasive. The instant claims recite only "aggregate" broadly and give no further indication as to how "aggregate" is to be interpreted. During patent examination, the pending claims must be "given the broadest reasonable interpretation consistent with the specification" by giving words their plain meaning unless the specification provides a clear definition.[1] Turning to the instant specification, the term "aggregate" is nowhere explicitly defined, although paragraph 0035 describes the aggregate as inclusive of "crushed and rounded sands." As such, there is no clear definition in the specification defining "aggregate" as exclusive of the aggregate of Helf. In an attempt to define the "plain meaning" of the term "aggregate" in the art, Applicant has cited the entry for "aggregate" from *The Civil Engineering Handbook*. The Examiner noted that this definition employs conditional language, stating:

> By far the largest amount of aggregate used in concrete is mineral aggregate — gravel and crushed stone (emphasis added).
>
> Concrete aggregates are almost always porous materials... (emphasis added).

[1] See *In re Prater*, 415 F.2d 1393, 1404-5, 162 USPQ 541 and *In re Zletz*, 893 F.2d 319, 321, 13 USPQ2d 1320.

As such, this definition also fails to clearly define "aggregate" as exclusive of the aggregate of Helf. Consequently, it remains the Examiner's position that the term "aggregate" as recited in the claims is inclusive of the aggregate of Helf. Applicant is reminded that, absent claim language carrying a narrow meaning, the PTO should only limit the claim language based on the specification or prosecution history when those sources expressly disclaim the broader definition.[2]

B. Applicant argues: "Helf does not teach the addition of cross-linking agents to the binder." This is not persuasive for two reasons. First, the various polymeric binders taught at column 4 are well-known, cross-linked binders. Second, the sulfur cross-linkers taught at column 5 are added to the binder by virtue of the fact that the rubber chippings formed thereby are added to the binder. Finally, the Examiner notes that the limitation requiring a cross-linker appears only in dependent claim 40, and so cannot weight against the *prima facie* case for the other claims.

C. Regarding the nature and relationship of stability and fatigue resistance, there is no evidence of record establishing the expectation of one of ordinary skill in the art vis-à-vis these properties at the time of the invention.

D. Finally, Harvey's description of fatigue performance in mix design at page 2, is a description of the procedures common in California at the time of the report. Later sections of the report (page 20, for example) demonstrate that Harvey did, indeed, use fatigue performance analysis. As such, this does not rise to the level of a teaching away.

Claim Rejections - 35 USC § 103

2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

3. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

4. **Claims 37-45 and 50-59 are rejected under 35 U.S.C. 103(a) as being unpatentable over Helf in view of Harvey et al.**

A. These claims are rejected for the same reasons set forth under this heading in the prior Office action.

5. **Claims 46, 47, and 49, are rejected under 35 U.S.C. 103(a) as being unpatentable over Helf in view of Harvey et al., as applied to the claims above, and further in view of Walter.**

A. These claims are rejected for the same reasons set forth under this heading in the prior Office action.

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[2] *In re Bigio*, 72 USPQ2d 1209 (CAFC 2004)

6. **Claim 48 is rejected under 35 U.S.C. 103(a) as being unpatentable over Helf in view of Harvey et al. and Walter, as applied to claim 45 above, and further in view of McDonald.**

A. These claims are rejected for the same reasons set forth under this heading in the prior Office action.

Conclusion

7. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

8. The prompt development of clear issues in the prosecution history requires that applicant's reply to this Office action be fully responsive (MPEP § 714.02). When filing an amendment, applicant should specifically point out the support for any amendment made to the disclosure, including new or amended claims (MPEP §§ 714.02 & 2163). A fully responsive reply to this Office action, if it includes new or amended claims, must therefore include an explicit citation (i.e., page number and line number) of that/those

portion(s) of the original disclosure which applicant contends support(s) the new or amended limitation(s).

Any inquiry concerning this communication or earlier communications from the examiner should be directed to William P. Fletcher III whose telephone number is (571) 272-1419. The examiner can normally be reached on Monday through Friday, 0900h-1700h.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Timothy H. Meeks can be reached on (571) 272-1423. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/William Phillip Fletcher III/
Primary Examiner

October 3, 2007